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Mankiranjit Kaur a/p Mehinder Singh v Harmeet Singh a/l Sarjeet Singh

HIGH COURT (KUALA LUMPUR) — DIVORCE PETITION NO 33–2362–12 OF 2011
NORAINI ABDUL RAHMAN J
5 SEPTEMBER 2013

Civil Procedure — Judge — Application to recuse judge — Judge refusing respondent's request for issue of subpoena — Whether there was real danger of bias — Whether appropriate case for recusal

Civil Procedure — Subpoena — Request for — Refusal to issue — Respondent requesting for issue of subpoena after petitioner closing case — Respondent failing to establish materiality and relevance of witness — Whether judge empowered to exercise her discretion not to issue subpoena

The respondent husband applied for the trial judge ('the judge') to recuse herself from continuing to hear the divorce petition between him and his wife. The matter trial part heard at the time the application was made. The respondent had requested for a subpoena to call one Dato' Zafir as a witness and the judge had declined the request. Hence this application for the judge to recuse herself. During pre trial case management the respondent had not indicated that he would be calling Dato' Zafir as a witness. At the time when the application to issue subpoena was made, four days of trial had gone by. The petitioner wife had already closed her case.

Held, dismissing the respondent's application with costs of RM5,000:

(1) There are two stages whereby application for subpoena can be issued. Firstly it is at the stage where the application is made before trial, that the deputy registrar or the senior assistant registrar can process. The second stage is where trial has started. In such a situation, the judge is seized of the conduct of the case and therefore if there is any application to issue subpoena, the deputy registrar is obliged to inform the judge because at this point the judge is in control of the conduct of the trial. In the present case, when the judge decided that the subpoena was not to be issued to Dato' Zafir, the judge was already seized with the conduct of the trial and therefore the judge was empowered to exercise her discretion to decide whether or not to issue the subpoena (see paras 21–23).

(2) There were no valid reasons given by the respondent for calling Dato' Zafir as a witness after the case had started. The only reason given by the

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respondent to call the said witness was to show that the petitioner had purportedly not told the truth during her cross-examination and that the purpose of calling Dato' Zafir was only to confirm the petitioner's phone number and also about the government quarters (see para 26).

(3) The crux of the issue in this petition was whether the marriage had irretrievably broken down as a result of the respondent's unreasonable behaviour as per s 54(1)(b) of the Law Reform (Marriage and Divorce) Act 1976. The evidence which the witness, Dato' Zafir was supposed to give was not relevant nor material to the core issue of the petition which was the unreasonable behaviour of the respondent which led to the breakdown of the marriage (see paras 27 & 32).

(4) The respondent had not proved that there was 'a real danger of bias' on the part of the judge against the respondent (see para 33).

[Bahasa Malaysia summary

Responden memohon kepada hakim bicara ('hakim') untuk menarik diri daripada meneruskan mendengar petisyen perceraian antara dia dan isterinya. Sebahagian perbicaraan berkenaan perkara tersebut telah didengar pada masa permohonan tersebut dibuat. Responden memohon untuk sepina bagi memanggil seorang yang bernama Dato' Zafir sebagai saksi dan hakim menolak permohonan tersebut. Maka permohonan ini untuk hakim tersebut menarik dirinya. Semasa pra perbicaraan pengurusan kes responden tidak menunjukkan yang dia akan memanggil Dato' Zafir sebagai saksi. Pada masa tersebut apabila permohonan untuk mengeluarkan sepina dibuat, empat hari perbicaraan telah berlalu. Pempetisyen telah menutup kesnya.

Diputuskan, menolak permohonan responden dengan kos sebanyak RM5,000:

(1) Terdapat dua peringkat di mana permohonan untuk sepina boleh dikeluarkan. Pertama ia adalah pada peringkat di mana permohonan dibuat sebelum perbicaraan, bahawa timbalan pendaftar atau timbalan pendaftar kanan boleh memproses. Peringkat kedua adalah di mana perbicaraan telah bermula. Dalam keadaan sedemikian, hakim telah sedia maklum dengan perjalanan kes tersebut dan oleh itu jika terdapat apa-apa permohonan untuk mengeluarkan sepina, timbalan pendaftar adalah bertanggungjawab untuk memberitahu hakim kerana pada masa ini hakim adalah dalam kawalan perjalanan perbicaraan tersebut. Dalam kes ini, apabila hakim memutuskan bahawa sepina tidak dikeluarkan kepada Dato' Zafir, hakim telah sedia maklum dengan perjalanan perbicaraan tersebut dan oleh itu hakim diberi kuasa untuk menjalankan budi bicaranya untuk memutuskan sama ada atau tidak mengeluarkan sepina (lihat perenggan 21–23).

(2) Tidak terdapat alasan-alasan yang sah yang diberikan oleh responden

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untuk memanggil Dato' Zafir sebagai saksi selepas kes telah bermula. Satu-satunya alasan yang diberikan oleh responden untuk memanggil saksi tersebut adalah untuk menunjukkan bahawa pempetisyen tidak memberitahu perkara benar semasa pemeriksaan balasnya dan bahawa tujuan memanggil Dato' Zafir hanya untuk mengesahkan nombor telefon pempetisyen dan juga mengenai kuarters kerajaan (lihat perenggan 26).

(3) Teras isu dalam petisyen ini adalah sama ada perkahwinan telah tidak dapat diselamatkan akibat kelakuan tidak munasabah responden mengikut s 54(1)(b) Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976. Keterangan yang mana patut diberikan oleh saksi, Dato' Zafir adalah tidak relevan atau material kepada teras isu petisyen yang mana adalah kelakuan tidak munasabah responden yang membawa kepada kehancuran perkahwinan (lihat perenggan 27 & 32).

(4) Responden tidak membuktikan bahawa terdapat 'a real danger of bias' oleh pihak hakim terhadap responden (lihat perenggan 33).]

Notes

For cases on application to recuse, see 2(2) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 4582–4597.

Cases referred to

Comsa Farms Bhd v Malayan Assurance Alliance Bhd (No 1) [2012] 10 MLJ 526, HC (refd)

Dato' See Teow Chuan & Ors v Ooi Woon Chee & Ors and another applications [2013] 4 MLJ 351, FC (refd)

ECM Libra Investment Bank Bhd v Foo Ali Meng & Ors [2013] 3 MLJ 35, CA (refd)

Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors [1995] 2 MLJ 213, CA (refd)

Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara [2002] 1 MLJ 321, FC (refd)

Wong Sin Chong & Anor v Bhagwan Singh & Anor [1993] 3 MLJ 679, SC (refd)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 s 54(1)(b)

Noraini Abdul Rahman J:

[1] This is an application at encl 42 by the respondent husband for the following orders:

(a) *satu perintah bahawa hakim bicara, Yang Arif Dato' Noraini bt Abdul Rahman di rekuis* ('recuse') *daripada mendengar Petisyen Perceraian*

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Mahkamah Tinggi Kuala Lumpur No 33–2362–12 Tahun 2011 dengan serta merta;

(b) *keseluruhan perbicaraan ditangguh sehingga permohonan responden didengar dan dilupus secara muktamad*;

(c) *perbicaraan petisyen perceraian diteruskan di hadapan hakim Mahkamah Tinggi Kuala Lumpur yang dipilih oleh Ketua Hakim Negara/Hakim Besar Malaya; dan*

(d) *tiada perintah mengenai kos*.

[2] In short, the respondent husband is asking me to recuse myself from continuing to hear the divorce petition between him and his wife with immediate effect, that the case which at the time of writing this judgment is still part heard and that the case be continued before another judge appointed by the Chief Justice or the Chief Judge of Malaya.

[3] Both counsel submitted before me. Counsel for the respondent husband did not prepare written submission whilst counsel for the petitioner wife prepared written submission.

[4] In order to understand how this application to recuse me, it is better that a chronology of event be set out. I am reproducing the chronology of event as found in the written submission of Datuk Jagjit Singh counsel for the petitioner wife. Now it is important for me to acknowledge this lest that I be accused of plagiarism.

CHRONOLOGY

19 March 2013 —	Examination-in-chief and cross-examination of the pettioner.
20 March 2013 —	Cross-examination of the petitioner.
21 March 2013 —	Cross-examination of the petitioner
19 April 2013 —	Re-examination of the petitioner.
6 May 2013 —	The respondent filed request for issue of a subpoena to call Dato' Mohd Zafir bin Ibrahim as a witness.
13 May 2013 —	Judge declined the request for issue of a subpoena for witness to be called.
17 May 2013 —	Oral application made in open court by the respondent for the judge to recuse herself.
27 June 2013 —	The respondent filed an application (encl 42) for the judge to recuse herself.

[5] As a brief background, the trial had gone on for four days on 19 February 2013, 20 March 2013, 21 March 2013 and 19 April 2013. In fact,

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after the examination-in-chief on 19 March 2013, the cross-examination was conducted over three days. A total of 307 questions were asked by the respondent husband's counsel during cross-examination. As a result, the four days allocated for the trial was not enough and the court fixed other dates for continued hearing. It was during this break in trial that the respondent husband filed an application to subpoena one Dato' Mohd Zafir bin Ibrahim, *Pengarah Pengurusan,* Pejabat Ketua Pendaftar, Mahkamah Persekutuan as a defence witness. Now, the request for subpoena came to the deputy registrar who immediately alerted me about the matter. I then asked her to arrange for a case management and to inform both counsel to be present. In view of the fact that in civil cases, there should be no element of surprise, I instructed the deputy registrar to inform both counsel that the case management was about the issuance of subpoena to Dato' Zafir.

[6] Having heard the submissions by both parties, I decided that no subpoena be issued against Dato' Mohd Zafir because, during the mediation and various appearances of both counsel before me, it was indicated that for the trial, the petitioner wife has only one witness ie herself. The respondent husband indicated there are three witnesses to be called ie:

(a) the respondent husband;

(b) uncle of the respondent; and

(c) a doctor.

[7] Based on the above, seven days had been allocated for the trial ie 19–21 March 2013, 19 April 2013, 17 May 2013 and 2–3 July 2013. No mention was made as regards Dato' Mohd Zafir.

[8] At the time when the application to issue subpoena was made, four days of trial had gone by. The petitioner wife had already closed her case. Now, just before the continuation of the trial on 17 May 2013, the respondent husband applied for the subpoena.

[9] I decided that subpoena should not be issued because in earlier mediation and other occasions, the respondent husband did not mention at all about calling Dato' Mohd Zafir. To allow the respondent husband to subpoena him would mean that at any time after trial had proceeded, he could call any number of witnesses. That would delay the trial. If the respondent husband had wanted Dato' Mohd Zafir to give evidence, it should be clearly told during mediation and other occasions which took place before the start of the trial.

[10] To allow the respondent husband to call witnesses to rebut any evidence as and when he felt it necessary during the trial would be an abuse of court

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process. One must be sure of witnesses and not play it by the ear and apply whenever the respondent husband like it. It would also prolong the trial. It is against this decision that the respondent husband made as application to recuse. According to counsel for the respondent husband, what I had done represent a real danger of bias. He added that the e-filing system should not be used by any party (in this case the court) to monitor the filing of any document or cause papers or subpoena as the process itself should be allowed to take its course.

[11] Before I deal with the submission of counsel for the petitioner wife, I would like to say that both counsel agreed on the law regarding disqualification or recusal of judges.

[12] In a very recent Federal Court case of *Dato' See Teow Chuan & Ors v Ooi Woon Chee & Ors and another applications* [2013] 4 MLJ 351 the Federal Court held that:

> It was settled law in this country that a judgment might only be challenged on the ground of actual bias or real danger of bias and not on the ground of apparent bias. There was no evidence whatsoever, either in the grounds of judgment or in the conduct of the judges, to substantiate the applicants' contention that there existed a real danger or real likelihood of bias on the part of any members of the Court.

[13] In the Federal Court case of *Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara* [2002] 1 MLJ 321, the Federal Court held that:

> The test to be applied in the present case was the 'real danger of bias' test. Hence, the question here was whether having regard to the facts and circumstances, was there a real danger of bias on the part of the learned trial judge when he heard the habeas corpus application (see p 325D); *R v Gough* [1993] AC 646 followed.

[14] In the Court of Appeal case of *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors* [1995] 2 MLJ 213, Mr Justice NH Chan stated as follows at p 226:

> Circumstances must be shown to exist which would tend or which might be regarded as tending to cause the case not to be decided on the evidence.

[15] In *Comsa Farms Bhd v Malaysian Assurance Alliance Bhd (No 1)* [2012] 10 MLJ 526, the High Court held that:

> In order to justify disqualification or recusal, the judge's bias usually should be personal or based on some extrajudicial reason. This Court found that the 'real danger of bias' test imposed a high threshold for the applicant to satisfy. Thus, it would be a gross dereliction of duty for a judge to disqualify himself where there was no real danger of bias in hearing the case and an application for recusal with no appropriate grounds ought to be treated as an attempt to interfere with the administration of justice. Further, the failure of the judge or the judiciary to protect

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the administration of justice was also viewed as dereliction of duty and omission to act pursuant to art 126 of the Federal Constitution (see para 11(h)).

[16] Now, coming back to counsel for the petitioner's submission. He submitted that based on the facts and events that had happened, the respondent husband had not reached the threshold of 'real danger of bias' test.

[17] The proceedings had started and hearing had commenced for four days ie on 19–21 March 2013 and 19 April 2013.

[18] The respondent was given ample time and full latitude to cross-examine the petitioner as the cross-examination of the petitioner went on for three days ie on 19–21 March 2013. A total of 307 questions were asked.

[19] The respondent sought to apply for a subpoena during the process of a continuing trial ie after four days of hearing and not at the stage of case management which was conducted before trial by the deputy registrar.

[20] The petitioner's counsel further submitted that once the trial had started and during the course of the trial, a judge is seized of the conduct of the case. Therefore, it is the absolute discretion of the judge to exercise his or her discretion whether or not to allow the respondent to extract a subpoena for service.

[21] I agree with the submission because as I see it, there are two stages whereby application for subpoena can be issued.

[22] Firstly it is at the stage where the application is made before trial, that the deputy registrar or the senior assistant registrar can process. The second stage is where a trial had started as in our case. In such a situation, the judge is seized of the conduct of the case and therefore if there are any application to issue subpoena, the deputy registrar is under an obligation to inform the judge because at this point the judge is in control of the conduct of the trial. Hence, the action of the deputy registrar in our case was not wrong and she was not monitoring the application for subpoena for anyone's interest. She was just doing her job.

[23] When I decided that the subpoena was not to be issued to Dato' Zafir, I was already seized with the conduct of the trial and therefore I was empowered to exercise my discretion to decide whether or not to issue the subpoena.

[24] In any event, there are cases to support my decision as cited by counsel for the petitioner.

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[25] In the Supreme Court case of *Wong Sin Chong & Anor v Bhagwan Singh & Anor* [1993] 3 MLJ 679, the subpoena was issued after the hearing had commenced for two days and the Supreme Court held that there was no explanation for the delay and as such it was an abuse of the process of the court and should be set aside.

[26] There were no valid reasons given by the respondent for calling Dato' Mohd Zafir bin Ibrahim as a witness after the case had started. The only reason given by the respondent to call the said witness was to show that the petitioner had purportedly not told the truth during her cross-examination and that the purpose of calling Dato' Zafir was only to confirm the petitioner's phone number and also about the government quarters.

[27] The crux of the issue in this petition is whether the marriage has irretrievably broken down as a result of the respondent's unreasonable behaviour as per s 54(1)(b) of the Law Reform (Marriage and Divorce) Act 1976.

[28] In the Court of Appeal case of *ECM Libra Investment Bank Bhd v Foo Ali Meng & Ors* [2013] 3 MLJ 35, the Court of Appeal held as follows:

> A litigant under the rules of court has a right to issue a subpoena and sustain the same provided it is not oppressive or an abuse of process of court and is relevant and material to the case and is not frivolous or scandalous. It is equally well-settled in every case, the onus is on the party issuing the subpoena to show the materiality of the witness for the just decision of the case, in that it outweighs any oppression that may be caused to the party objecting.

[29] In the case of *Wong Sin Chong & Anor v Bhagwan Singh & Anor* [1993] 3 MLJ 679, the Supreme Court held that:

> The onus is on the party issuing the subpoena to show the materiality of the witness, in that it outweighs any oppression that may be caused to the party objecting.

[30] The Supreme Court judge, Justice Mohamed Azmi in the same case stated at p 690 as follows:

> In our view, save for annoyance and confrontation, no useful purpose would be obtained by the attendance of Dato' Wrigglesworth as witness.

[31] Counsel for the petitioner submitted that the proposed witness Dato' Mohd Zafir bin Ibrahim was only able to give evidence based on the documents from a file the contents of which he has no personal knowledge and therefore would be hearsay evidence.

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[32] The evidence which the witness, Dato' Mohd Zafir bin Ibrahim is supposed to give is not relevant nor material to the core issue of this petition which is the unreasonable behaviour of the respondent which led to the breakdown of the marriage.

[33] Based on the above, I am of the opinion that the respondent had not proved that there is 'a real danger of bias' on my part against the respondent. I did not allow the subpoena to be issued to Dato' Zafir. I had heard submissions on both sides and it is only after careful consideration that I made my decision. I did not make the decision in a cavalier manner. As such, I am not recusing myself from further continuing to hear this case.

[34] On the point of recusal too, counsel for the petitioner cited the case of *Comsa Farms Bhd v Malayan Assurance Alliance Bhd (No 1)* [2012] 10 MLJ 526 where the His Lordship Hamid Sultan J (as he then was) held:

> This Court found that the defendant's application was mischievous and an abuse of process of the Court. In the Malaysian context, a recusal application would be more appropriate if dealt with informally through the office of the Chief Justice or managing judge. It follows from the wording of s 20 of the Courts of Judicature Act 1964 and s 11 of the Judges' Code of Ethics 2009 that a recusal application before a judge in the first instance is most inappropriate and the applicant could unnecessarily be exposed to contempt proceedings if it was later found that the application had been made in a cavalier manner and in bad faith so as to undermine the administration of justice (see para 11).

[35] It is to be noted that Justice Hamid Sultan had said that if it was later found that the application to recuse a judge is made in a cavalier manner and in bad faith, the applicant and in our case, the respondent husband can be cited for contempt of court.

[36] Justice Hamid Sultan in his judgment also cited the decision of Justice Abang Iskandar bin Abang Hashim where he (Justice Hamid Sultan) said:

> In the case of *Mohamad Ezam Mohd Nor & Ors v Inspector General of Police* [2001] 2 MLJ 481. The learned judge had this to say:
>
> > Just as it is improper for a judge to hear a case when there may be a reasonable perception of bias if he hears the case, it is equally wrong for him to disqualify himself from hearing a case when there are no such grounds to do so. As a matter of fact, it would be a gross dereliction of duty for a judge to disqualify himself when there are no grounds.
> >
> > I must say here the 'real danger of bias' test imposes a high threshold for the applicant to satisfy. In a yet unreported case (see *Michael Chow Keat Thye v Suruhanjaya Sekuriti Malaysia & Sime Darby Nominees Sdn Bhd*, Suit No R1–25–288–11 of 2011, Kuala Lumpur High Court), Justice Abang Iskandar bin Abang Hashim in an illuminating judgment went on to stress the nexus

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A requirement within the judge, the parties and the objectivity of the administration of justice itself inclusive of the duty and obligation of the judge pursuant to his constitutional oath. His Lordship sums up the rest for recusal in an eloquent and practical manner, and part reads as follows:

B So in the final analysis, in the context of a potential conflict, it is not the question of whether or not a judge wants or insists, or that he does not want, to hear a case, because the practical test is rather simple, 'If there is no real danger of bias on the part of the judge, then he ought to, nay he is duty bound to hear the case, and there are no two ways about it. I think that, in all humility, is the simple rule of the thumb for a judge to observe and apply.

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[37] For all the reason above I am dismissing the respondent husband's application with cost of RM5,000.

Respondent's application dismissed with costs of RM5,000.

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Reported by Kanesh Sundrum

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